Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19	)	MM Docket No. 92-265
of the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	
	)	
Development of Competition and	)	
Diversity in Video Programming	)	
Distribution and Carriage	)	

COMMENTS OF TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND THE WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS

Telecommunications Research and Action Center[1] and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights[2] (TRAC/WACCI-VCR) respectfully submit these comments in response to the above-captioned Notice of Proposed Rulemaking, FCC 92-543 (released December 24, 1992) (NPRM).

As this necessarily brief submission demonstrates, the fundamental thrust of the Commission's proposals is so ill-founded that TRAC/WACCI-VCR feel it is imperative to set forth their objections. The large number of pending proceedings involving the implementa-

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[1]TRAC is a non-profit membership organization. Its members are viewers of the electronic media who reside throughout the United States. Some of TRAC's members subscribe to cable television services and others subscribe to other multichannel video programming services. TRAC seeks, inter alia, to represent its members' interests in protecting their right to diverse video programming and diverse video programming services.

[2]WACCI-VCR is a non-profit membership organization. Its members are viewers of the electronic media who reside in the Washington, DC metropolitan area. Some of WACCI-VCR's members subscribe to cable television services and others subscribe to other multichannel video programming services. WACCI-VCR seeks, inter alia, to represent its members' interests in protecting their right to diverse video programming and diverse video programming services.

tion of the 1992 Cable Act makes it impossible to submit detailed comments in this docket. However, TRAC/WACCI-VCR do wish to be recorded as sharing, in general, the views of those parties filing comments urging greater access to programming directly and indirectly controlled by vertically-integrated MSO's. The needs of the viewing public - including the 40% of the public who cannot or choose not to subscribe to cable - are best served by the development of many vibrant competitive options to cable. Simply put, the Commission's proposed allocation of burdens in enforcing and implementing the 1992 Cable Act flatly contravenes Congressional intent to promote competition.

The 1992 Cable Act contains unusually clear, explicit and definitive legislative findings as to the current state of the cable monopoly. The FCC's job is to act upon these findings, not to question them or to initiate a de novo reexamination of the matters addressed by Congress. The program access provisions are perhaps the most important facet of the new statute's attack on the cable industry's predatory and restrictive practices with respect to inhibiting the growth of direct competition. The unusually long and detailed floor debate on these measures, most especially in the House, where Section 19 was enacted by overwhelming vote as a floor amendment, manifests just how strong Congress felt that the factual findings in Section 2 of the Act apply to program access.

For example, at several places (e.g., ¶19 n. 2, ¶12), the NPRM reopens for comment the issue of whether cable MSO's have control over affiliated programmers or whether unjustified price differen-

tials have detrimental consequences for competing service providers. But these are not matters committed to Commission discretion. The Congressional findings are dispositive, and the Commission should focus instead on how best to remediate these anti-competitive phenomena.

The Commission similarly attempts to alter the analytical framework of Section 19. At Paragraph 10 of the NPRM, it proposes to read Section 19(b) and (c) as permitting a two-step process under which aggrieved multichannel video programming distributors (MVPD) must meet the burden of establishing a discriminatory pricing differential or an unlawfully exclusive contract and then show that these practices caused harm. But this overlooks the plain language of Section 19(c), which establishes specific per se violations actionable under Section 19(b). Such violations (e.g., price discrimination) should not be subjected to the requirement that harm be established to the satisfaction of the Commission.

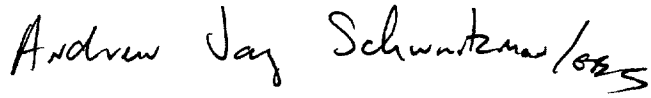
The FCC also attempts to shift the burden of proof from the programmer to the MVPD in showing unlawful price discrimination under subsection 19(c)(2)(B). Although the plain language of the statute requires only that an aggrieved MVPD establish discrimination, the Commission's four options each require additional showings.

TRAC/WACCI-VCR also challenge the FCC's action reopening inquiry into whether exclusive contracts harm competitors. Congress found that they do. Therefore, TRAC/WACCI-VCR support parties urging that program contracts should be filed with the FCC and be

available for inspection. Exceptions should be determined case by case, and not by means of impermissible blanket presumptions.

Finally, TRAC/WACCI-VCR strongly oppose the use of broadcast attribution standards for cable. TRAC/WACCI-VCR believe that current broadcast attribution rules are a horrible model; there is no rational basis for compounding the felony. Moreover, cable is a different industry, and these all-important rules must be crafted to fit its peculiar characteristics. Broadcast criteria do not address vertical integration, and the power that small percentage owners can wield thereby. Therefore, the FCC must look to actual influence - voting rights, options exercisable under coercive terms, convertible debt, etc. - to determine attributable ownership.

Respectfully submitted,



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